

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW BROADNAX,

Defendant-Appellant.

UNPUBLISHED

November 25, 2014

No. 317572

Wayne Circuit Court

LC No. 13-001249-FC

Before: O'CONNELL, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced, as fourth habitual offender, MCL 769.12, to 15 to 30 years' imprisonment for the armed robbery and assault with intent to do great bodily harm less than murder convictions. We affirm.

I. UNDERLYING FACTS

On January 24, 2013, defendant entered a Family Dollar located in Detroit. Defendant approached the cash register where employee Stephen Mitchell was working. Defendant gave Mitchell four quarters and asked for a dollar in return. When Mitchell opened the cash register, defendant reached over with his left hand, grabbed the cash drawer, and used his right hand to stab Mitchell. Mitchell could not see what defendant stabbed him with, but he believed, at first, that defendant stabbed him with a razor blade. Mitchell fell backward, and defendant ran out of the store with the cash drawer. Other Family Dollar employees, Lelia Muckleroy and Darryl Clay, ran after defendant. Mitchell followed Muckleroy and Clay, and located the cash drawer outside of the Family Dollar. Upon re-entering the store, the employees found a screwdriver that had been shaved to a point. Mitchell sustained an injury to his chest from the incident. Defendant told police that he took the cash drawer but only removed about \$30. Defendant stated that he had a screwdriver in his coat pocket but he did not use it. Defendant was charged, and the case proceeded to trial, where he was convicted. Defendant now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied the effective assistance of counsel. We disagree. To preserve a claim of ineffective assistance of counsel, a defendant must make a

motion for a new trial or an evidentiary hearing with the trial court. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Defendant never moved for a new trial or a *Ginther*¹ hearing in the trial court. Defendant filed a motion to remand for a *Ginther* hearing in this Court, but his motion was denied. *People v Broadnax*, unpublished order of the Court of Appeals, entered January 23, 2014 (Docket No. 317572). When an ineffective assistance of counsel claim is unpreserved, “this Court’s review is limited to mistakes apparent from the record.” *Heft*, 299 Mich App at 80.

“To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice.” *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). “To demonstrate prejudice, a defendant must show the probability that, but for counsel’s errors, the result of the proceedings would have been different.” *Nix*, 301 Mich App at 207. Defendant also bears the burden of establishing a factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

A. FAILURE TO OBJECT TO THE ADMISSION OF THE ALLEGED WEAPON

Defendant contends that defense counsel was ineffective for failing to object to the introduction of the alleged weapon, a screwdriver, as evidence because it was not relevant and because the prosecution did not lay a proper foundation for its admission.

Relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence.” MRE 401. Pursuant to MRE 402, “All relevant evidence is admissible” However, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” MRE 403. The alleged weapon, a screwdriver with the end shaved to a point, was relevant to the prosecution’s theory of the case. Mitchell testified that during the robbery, defendant stabbed him with a metal item that created a “little gash” in his chest. Mitchell, Muckleroy, and Clay all saw the screwdriver on the floor inside the Family Dollar after the robbery and testified that the screwdriver was not there before the robbery. Leroy Huelsenbeck, a Detroit Police Officer, collected the screwdriver from the Family Dollar during his investigation. Furthermore, George O’Gorman, Huelsenbeck’s partner, testified that when he searched defendant he did not find a weapon on his person. However, during his custodial interrogation, defendant told police he had a screwdriver in his pocket at the time of the robbery. Thus, Mitchell was stabbed and injured by a metal object; a screwdriver was found in the Family Dollar; the screwdriver was not in the store before the robbery; and defendant stated that he had a screwdriver on his person at the time he entered the store. For these reasons, the alleged weapon, the screwdriver, was relevant evidence. MRE 401. Further, whatever prejudicial effect the weapon may have had was far outweighed by its probative value. Counsel is not ineffective for failing to present a meritless argument. *People v Ericksen*, 288 Mich App 192, 201; 793

¹ See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

NW2d 120 (2010). Therefore, defense counsel's failure to object to the admission of the screwdriver because it was not relevant does not constitute ineffective assistance of counsel.

As a corollary matter to this issue, defendant also contends that defense counsel was ineffective for failing to object to the introduction of the weapon because the prosecution failed to lay the proper foundation. Defendant argues that no foundation was laid to prove that Mitchell, Muckleroy, and Clay inspected the Family Dollar before the robbery, and, thus, they could not verify that weapon was not on the floor before the robbery. MRE 901 requires that before evidence can be introduced, it must be authenticated or identified. Evidence can be authenticated or identified by "[t]estimony that a matter is what it is claimed to be." MRE 901(b)(1). Before the weapon was introduced into evidence, Mitchell was asked if the weapon was the object he saw at the Family Dollar on January 24, 2013, and Mitchell answered affirmatively. Defense counsel did not object, and the weapon was admitted. In his testimony *after* the admission of the screwdriver, Mitchell stated that the screwdriver was not in the Family Dollar before defendant committed the robbery. Based on Mitchell's testimony, we hold that the prosecution laid a proper foundation for the introduction of the screwdriver into evidence. See MRE 901. Because an attorney is not ineffective for failing to object to admissible evidence, defense counsel's failure to object does not constitute ineffective assistance of counsel. *Ericksen*, 288 Mich App at 201.

B. FAILURE TO OBJECT TO QUESTIONS BY TRIAL COURT

Defendant asserts that defense counsel should have objected to prejudicial questioning by the trial court. Specifically, defendant claims that the trial court improperly questioned Mitchell regarding defendant stabbing Mitchell even though there was no testimony that Mitchell saw the weapon or that the screwdriver belonged to defendant. The trial court asked Mitchell the following:

The Court. Mr. Mitchell, that's just what I was going to ask you, okay. When this man lunged at you with this object in his hand, how much room did you have behind you?

Mitchell. When the drawer popped open?

The Court. When he lunged at you with this object.

Mitchell. I had about this much room. The cabinet is still right here.

The Court. Okay, about a foot and a half behind you, okay, all right.

Defendant contends that the trial court's questioning prejudiced defendant by bolstering the prosecution's theory of the case. However, by this point in Mitchell's questioning, Mitchell had already testified that he had been stabbed by a metal object. The court has the right to interrogate witnesses. MRE 614(b). The court may question witnesses to elicit additional information or clarify the witness's testimony. *People v Davis*, 216 Mich App 47, 49-50; 549 NW2d 1 (1996). The court must ensure that its questions are not "intimidating, argumentative, prejudicial, unfair, or partial." *Id.* at 50. Here, the trial court merely attempted to clarify the distance between Mitchell's cash register and the cabinet located behind Mitchell. Based on the

record, there was confusion at trial as to how Mitchell fell backwards. The trial court clarified that there was approximately one and a half feet behind Mitchell. The trial court asked only a few questions of Mitchell. The questions were posed neutrally. Also, any mention of a stabbing was already testified to by Mitchell. Thus, nothing the trial court did aroused suspicion in the mind of the jury. Any objection would have been futile, and counsel is not obligated to make futile objections. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Even if defense counsel should have objected to the trial court's questions, the trial court instructed the jury: "My comments, rulings, questions and instructions are also not evidence. . . . If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." In Michigan, "[j]urors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). Accordingly, any error caused by defense counsel's failure to object was cured by the trial court's curative jury instruction.

C. FAILURE TO OBJECT TO OPINION EVIDENCE

Defendant contends that defense counsel should have objected to opinion evidence given by the witnesses after viewing surveillance footage. Specifically, the witnesses opined when during the video Mitchell was stabbed, which was purely speculative because the stabbing was not apparent in the video. In regard to Mitchell, defendant's argument is baseless. Before viewing the surveillance footage, Mitchell testified that he had been stabbed by defendant. Mitchell explained that although he did not see a weapon, he felt a metal object stab him in the chest and he had a puncture wound. Thus, Mitchell already testified that he had been stabbed before viewing the surveillance video.

Defendant also summarily asserts that showing the video surveillance footage to Muckleroy and Clay was improper because it allowed them to proffer purely speculative opinion testimony regarding Mitchell's stabbing. When Muckleroy viewed the surveillance footage, she identified herself, Mitchell, and Clay. Contrary to defendant's assertion, Muckleroy never offered her opinion regarding whether she was able to see a weapon in defendant's hand in the video or when Mitchell was stabbed. Clay initially testified that after returning from the restroom he witnessed defendant running out of the Family Dollar with the cash drawer in his hands. However, after Clay watched the surveillance video, he testified to the following:

Prosecution. . . . Now, Mr. Broadnax is the gentlemen in the black, correct?

Clay. Yes.

Prosecution. Okay. What is he doing right now?

Clay. He's stabbing Stephen Mitchell with the [screwdriver] that you have over there.

Prosecution. Okay. And is this the way you saw it back on January 24th?

Clay. Yes.

Clay's testimony regarding Mitchell's stabbing was improperly admitted at trial. MRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) *rationaly based on the perception of the witness* and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. [Emphasis added.]

Clay was in the restroom and never witnessed the stabbing; therefore, it was improper for him, pursuant to MRE 701, to testify to a stabbing that he did not witness. Defense counsel should have objected to this testimony. However, defendant was not prejudiced by defense counsel's failure to object because even if he had objected, Mitchell testified that he was stabbed, Mitchell had a puncture mark on his chest, and video surveillance footage showed defendant hitting Mitchell in the chest. All of this evidence overwhelmingly supports the conclusion that defendant was armed. Therefore, defense counsel was not ineffective for failure to object to the opinion evidence given by the witnesses after viewing the surveillance footage.

D. FAILURE TO MAKE A MOTION FOR DIRECTED VERDICT

Defendant contends that trial counsel was ineffective for failing to make a motion for directed verdict on the basis that there was not substantial evidence to prove defendant was armed. "Due process commands a directed verdict of acquittal when sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt is lacking." *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998) (internal footnotes, citations, and quotations omitted); MCR 6.419(A). The prosecution offered testimony by Mitchell that he was stabbed by defendant. Mitchell suffered a wound to his chest. A screwdriver was found at the Family Dollar. For all of these reasons, as well as the reasons discussed below in the analysis of defendant's sufficiency of the evidence claim, substantial evidence of defendant's guilt existed and was presented by the prosecution. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Hardy*, 494 Mich 430, 445; 835 NW2d 340 (2013). Because a motion would have been meritless, defense counsel was not ineffective for failing to make a motion for a directed verdict.

E. DEFENDANT'S STANDARD 4 BRIEF

In defendant's Standard 4 Brief he raises additional claims of ineffective assistance of counsel. Defendant claims that defense counsel failed to consult with defendant, failed to keep defendant reasonably informed, failed to provide defendant with discovery in a timely manner, waived defendant's arraignment on the information without defendant's consent, only met with defendant once before trial, and failed to investigate. These errors deprived defendant of a substantial defense. Defendant relies on testimony from the final conference, where defendant requested a new attorney.

"Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Counsel's failure to reasonably investigate a defendant's case may constitute ineffective assistance of counsel if

defendant is deprived of a substantial defense. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). “A substantial defense is one that might have made a difference in the outcome of the trial.” *Chapo*, 283 Mich App at 371 (citation omitted).

Defendant failed to show that defense counsel’s performance fell below an objective standard of reasonableness. See *Nix*, 301 Mich App at 207. In support of his claim, defendant relies on the transcript from the final conference. At that conference, defendant requested a new attorney, and the trial court denied his request. Defendant told the court that he had not received any of the discovery materials, and the trial court ordered defense counsel to provide those documents to defendant. Defense counsel stated that he had discussed the case with defendant and there was nothing defendant was not aware of in the case. Defendant also complained that he had requested defense counsel file motions, and defense counsel had not complied. Specifically, defendant wanted a motion for a bond hearing, but he acknowledged on the record that he was not entitled to a bond. He also complained that his arraignment on the information was waived without his knowledge or consent. The complaints made by defendant at the final conference do not establish that defense counsel’s performance was deficient. Defendant’s complaint about discovery was resolved by the trial court. In regard to the motion for a bond hearing, defendant acknowledged on the record he was not entitled to a bond. Defense counsel is not deficient for failure to make a frivolous or meritless motion. *Hardy*, 494 Mich at 445. Finally, defendant complains his arraignment was waived without consent, but there is no indication that defendant was unaware of the charges against him, and defense counsel stated that defendant watched the preliminary examination and stated that defendant was aware of everything that was happening in the case. In regard to defendant’s other claims from his Standard 4 brief, there is no record evidence that supports defendant’s claims for ineffective assistance of counsel. Our review is limited to the facts on the record, and defendant bears the burden of establishing a factual predicate for his claim. *Heft*, 299 Mich App at 80; *Carbin*, 463 Mich at 600. Moreover, defendant has not shown that he was prejudiced by counsel’s alleged errors. Defendant asserts that counsel’s alleged failures may have made a difference at trial, but does not explain what the difference would be or why counsel’s failures impacted the trial. See *Nix*, 301 Mich App at 207. Therefore, the claims raised by defendant in his Standard 4 brief lack merit.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to prove defendant was armed at the time he committed the robbery. We disagree.

Challenges to the sufficiency of the evidence are reviewed de novo to “determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012). All evidence is reviewed in the light most favorable to the prosecution, *id.*, and “[a]ll conflicts in the evidence must be resolved in favor of the prosecution,” *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The elements of armed robbery are:

(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (internal quotations and footnotes omitted); see also MCL 750.529.]

Defendant asserts that the prosecution submitted insufficient evidence to prove he was armed at the time he robbed the Family Dollar. However, the prosecution presented substantial evidence to show that defendant during the robbery. First, Mitchell testified to the fact that he was stabbed with a sharp, metal object. Mitchell stated that he suffered an injury from the stabbing. Aside from Mitchell's testimony regarding being stabbed, Muckelroy, Clay, and Huelsenbeck all observed defendant's injury and testified that he was injured. Clay described the wound as a "puncture wound like he was stabbed." Also, Mitchell removed his shirt at trial and showed the jury his injury. In addition, after taking the cash drawer, defendant fled the store. Mitchell, Muckleroy, and Clay discovered a shaved-off screwdriver on the floor of the store near the vestibule, through which defendant fled. Mitchell, Muckleroy, and Clay testified that the screwdriver was not in the Family Dollar before defendant robbed the store. Defendant told police that he had a screwdriver with him at the time that he robbed the Family Dollar. Evidence of an offense "may be established on the basis of circumstantial evidence and reasonable inferences from the evidence." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). Based on the evidence described above, we hold that overwhelming evidence supported the jury's conclusion that defendant was armed at the time he robbed the Family Dollar.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood